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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 688

H. V. TURNER, ARTHUR L. SWEENEY, P. C. COPELAND, and PETER L. MENSER,
Appellants,

vs.

THE STATE OF KANSAS,
Appellee.

On Appeal from the Supreme Court of the State of Kansas.

JURISDICTIONAL STATEMENT.

LEWIS, FIELD, DEGOFF & STEIN,
MARVIN E. LEWIS,
Penthouse, DeYoung Building,
San Francisco 4, California,
Attorneys for Appellants.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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vs.

THE STATE OF KANSAS,

Appellee.

On Appeal from the Supreme Court of the State of Kansas.

JURISDICTIONAL STATEMENT.

Appellants appeal from a decision of the Supreme Court of Kansas, entered August 1, 1958, affirming a judgment of the Wyandotte County District Court, Division No. 3, finding appellants guilty of violating sections 75-421 to 75-427, inclusive, G.S. of Kan.

Supp. 1955; and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW.

The opinion of the Supreme Court of Kansas is reported in 328 P.2d 733, and 183 Kan..... Copies of the opinion and judgment are attached hereto as Appendix A.

JURISDICTION.

This is a criminal action wherein certain colored masons, The Prince Hall Lodge, caused an action to be brought by the county attorney of Wyandotte County, Kansas, under sections 75-421 through 75-427, G.S., 1955 Supp. (also known as "Kansas Emblems Registration Act"). The amended information, dated November 9, 1956, alleged that appellants "did wilfully and unlawfully wear, exhibit, display and use for the purpose of misleading and confusing the public, a name, badge, button, decoration, charm, emblem, rosette and other insignia of the Prince Hall Grand Lodge of Ks. and Jurisdiction, F. and A.M., an incorporated fraternal society of Kansas, this same having already been duly registered pursuant to the provisions of Sections 75-421 and 75-427 inclusive, G. S. of Ks. Supp. 1955; that the said defendants, H. B. Turner, Arthur L. Sweeney, P. C. Copeland Peter L.

Menser, *and the Masonic organization to which they belong* have not been peaceably using the emblem, name, badge, button, decoration, charm, rosette, or other insignia for a period of twenty-five (25) years or more, and all of said unlawful actions done as aforesaid, while the said H. B. Turner, Arthur L. Sweeney, P. C. Copeland and Peter L. Menser were not members of *nor entitled to use and wear the same, under the Constitution, and by-laws, rules and regulations of the said Prince Hall Grand Lodge* of Ks. and Jurisdiction, F. and A.M., an incorporated fraternal society of Kansas." (Emphasis added.)

To the information, all of the appellants entered a plea of not guilty. The court dismissed the charge of the use of the name since they were not the same. However, a verdict of guilty was rendered against appellants by the jury on November 19, 1956, and the court fined them $5.00 each and costs.

Appellants appealed from the judgment of conviction, and the Supreme Court of Kansas affirmed such judgment on August 1, 1958.

The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code Annotated, section 1257(2).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Winters v. People of State of N. Y.*, 333 U.S. 507, 509; *Miller v. Schoene*, 276 U.S. 272, 277; *Tregea v. Modesto Irrigation Dist.*, 164 U.S. 179, 185.

STATUTES INVOLVED.

Sections 75-421 to 75-427, inclusive, G.S., 1955 Supp. to G.S. 1949 (Laws of Kansas page 615) are set forth in Appendix B hereto.

QUESTIONS PRESENTED.

1. May a state, by criminal legislation, prohibit one masonic organization from wearing masonic emblems and insignia which have been adopted and used by all masons throughout the world for hundreds of years, and bestow upon only certain masons in Kansas the exclusive privilege and right to wear and display these emblems, when such legislation is in direct conflict with federal laws?

2. When a state, by criminal legislation, prohibits one masonic organization from wearing masonic emblems and insignia which have been adopted and used by all masons throughout the world for hundreds of years, and bestows upon only certain masons in Kansas the exclusive privilege and right to wear and display these emblems, does it thereby violate appellants' rights under the Fourteenth Amendment to the Constitution of the United States in that:

(a) It deprives them of their property without due process of law; and

(b) It denies to them the equal protection of the laws?

3. Is a state exceeding a lawful exercise of its police power when it, by criminal legislation, pro-

hibits one masonic organization from wearing masonic emblems and insignia which have been adopted and used by all masons throughout the world for hundreds of years, and bestows upon only certain masons in Kansas the exclusive privilege and right to wear and display these emblems?

4. Does a state statute, which makes the legality of an act depend upon the "constitution and bylaws, rules and regulations" of secret organizations, constitute an improper delegation of legislative authority because it is not sufficiently explicit to enable a person of ordinary intelligence to understand its provisions?

STATEMENT OF THE CASE.

How the federal questions are presented.

At the close of the evidence in the court of first instance, appellants made a motion for discharge (Transcript[1] page 182 et seq.) alleging, among other things, that the law under which they were prosecuted was in contravention of the Fourteenth Amendment of the Constitution of the United States in that it deprived them of a right guaranteed by that Constitution; and that it was in conflict with federal law regarding the registration of trademarks. This motion was denied. (TR. 184, lines 10-11.)

After the verdict of the jury finding appellants guilty was rendered (TR. 226), appellants filed a motion for a new trial on November 24, 1956 (Appendix

[1]Hereafter the "transcript" will be referred to merely as "TR."

C), alleging some 19 grounds of error, and again asserting the unconstitutionality of the state law as depriving them of their property without due process of law; and that it was unconstitutional because of its conflict with federal law. This motion was denied on January 12, 1957. (Appendix A, Journal Entry of Judgment, paragraph 2.) The judgment finding appellants guilty was entered on May 2, 1957. (Appendix A.)

On May 22, 1957, a notice of appeal to the Supreme Court of Kansas was entered, together with Specification of Errors (Appendix D) alleging that the trial court erred in upholding the constitutionality of sections 75-421 through 75-427, 1955 Supp., G.S. 1949, and that the entire law was contrary to federal trade-mark laws.

On August 1, 1958, the Supreme Court of Kansas affirmed the judgment of the trial court (Appendix A), relying solely upon the case of *Hammer v. State*, 173 Ind. 199, 89 N.E. 850.

On October 1, 1958, appellants' petition for rehearing in the Supreme Court of Kansas was denied. In this petition, appellants again set forth their objections to the statutes on the ground of their unconstitutionality.

In their notice of appeal to the Supreme Court of the United States, filed December 8, 1958, appellants maintained that the statutes deprive them of their rights without due process of law, that they deprive them of the equal protection of the laws, that the

said sections provide for an unlawful exercise of police power by the state, and that they are in conflict with federal laws.

Facts.

Prince Hall Grand Lodge and the United Supreme Council of the Ancient Accepted Scottish Rite for the 33rd Degree (the appellants being members of the latter organization) are colored masonic organizations which have lodges throughout the United States including Kansas. (TR. 6, lines 15-19 et seq.)

The masonic organization to which appellants belong was incorporated under an Act of Congress in the District of Columbia on October 24, 1895; and the name "The United Supreme Council of the Ancient Accepted Scottish Rite for the 33° and Last Degree of Free Masonry, for the Southern and Western Masonic Jurisdiction, U.S.A., Grand Orient, Washington, D.C." was registered with the Secretary of State of the State of Kansas on September 21, 1953, under Chapter 397 of the Laws of Kansas, 1953. (TR. 106, lines 1-22; TR. 147-148.)

On June 30, 1953 (TR. 30, lines 21, 22), the Prince Hall Lodge, claiming to be the only legitimate negro masonic organization in Kansas (TR. 49, lines 11-22), was instrumental in the passage of a law by the Legislature of Kansas. This law permitted registration of the names and emblems of any organization, and provided for criminal prosecution of those who wilfully displayed the registered names or emblems of an organization without being entitled to do so. An im-

portant exception from the operation of the law was "that nothing contained in this act shall deny the use of any . . . insignia to any organization which has been peaceably using the same for a period of twenty-five years or more prior to the date of this enactment." (Section 75-424.)

Immediately after the passage of the law (TR. 31, lines 7-10), an officer of Prince Hall Lodge went to the office of the secretary of state and duly registered its name, and the universal emblems of masonry consisting of the square and compass and a plain lambskin apron. The law was in effect three months and twenty-five days before appellants found out about it at which time they registered their name. (TR. 204, lines 10-12.) They did not register the universal masonic emblems since they were relying upon the twenty-five year proviso provision of section 74-424. The uncontradicted evidence showed that appellants had been peaceably wearing these universal masonic insignias for more than twenty-five years outside of the State of Kansas and for about six or seven years in Kansas. (TR. 118, lines 5-10; TR. 119, lines 4-6; TR. 129, lines 6-16; TR. 152, lines 1-25.)

On October 1, 1955, appellants, as members of the United Supreme Council etc., were peaceably having a parade in connection with their masonic work in the city limits of Kansas City, Kansas, when they were arrested by deputies from the office of the Sheriff of Wyandotte County, Kansas. (TR. 89, line 34 et seq.) They were tried before a jury in the District Court of Wyandotte County, Kansas, before the Honorable Harry G. Miller.

The principal witnesses against the appellants were members of the Prince Hall Lodge. (TR. 20, lines 24, 25; TR. 64, lines 22, 23; TR. 70, lines 12-14; TR. 10, lines 11-13.) Their main complaint was that the appellants were wearing the universal square and compass and lambskin apron of masonry which the Prince Hall Lodge had registered in the office of the Secretary of State of Kansas. They argued that the right to use such square and compass and plain lambskin apron was theirs exclusively by virtue of their registration under the Kansas Registration Act. (TR. 37, lines 16-25; TR. 38 et seq.) It was not claimed that appellants were holding themselves out as Prince Hall Lodge Masons.

While there was much irrelevant testimony admitted during the trial (TR. 222, lines 10-24), whether or not appellants' organization was clandestine was not an issue in this lawsuit, and the trial court so held (TR. 195, lines 24, 25.) The sole question was: did they violate a particular statute at the time and place in question? (TR. 178, lines 10, 11.)

Relative to the twenty-five year proviso of section 75-424, the court instructed the jury (TR. 205, lines 20-24) that the prosecution would have to prove appellants' organization had not been peaceably using such "badge, button, emblem, decoration, or insignia in Kansas *or in other states in the United States* for a period of twenty-five years or more prior to June 30, 1953." (Emphasis added.) This instruction was given in spite of the State's vigorous contention that the proviso applied only to use in the State of Kansas. (TR. 188, lines 10-17.)

A verdict of guilty was rendered against appellants by the jury and the court fined them $5.00 each. (TR. 226.)

THE QUESTIONS ARE SUBSTANTIAL.

The federal questions presented here are substantial and of public importance for the following reasons:

(1) THE KANSAS REGISTRATION ACT HERE BEING ATTACKED IS IN DIRECT CONFLICT WITH FEDERAL TRADE-MARK LAW IN THAT IT GRANTS A MONOPOLY IN THE USE OF A SYMBOL BY A FIRST REGISTRANT, WHEN SUCH REGISTRATION IS FORBIDDEN BY AN ACT OF CONGRESS.

As long ago as 1908, the Supreme Court of Montana recognized that a statute similar to the Kansas Registration Act might be in conflict with federal laws governing trademarks. In *State v. Holland,* 37 Mont. 393, 96 Pac. 719, 723, it was said:

> "As desirable as it may be that all these fraternal societies be guaranteed the exclusive use of their badges, rituals, and ceremonials, they cannot, perhaps, have such guaranty, unless by virtue of a patent or copyright [trade-mark] secured under the federal laws governing the subject. Upon the question whether they may thus, or by any other means, secure the right, *we express no opinion.*" (Emphasis added.)

In spite of the obvious importance of this question, it appears that whenever it has arisen the courts have uniformly preferred to "express no opinion" and have predicated their decisions on other grounds. See, for example, *Creswill v. Grand Lodge, K. of P.,* 225 U.S. 246.

The federal Trade-Mark Act of 1905, paragraph 5(b) provided, in substance, that any emblem or name adopted by any organization, club or society, which was incorporated in any state of the union prior to the adoption of the statute, was not registrable in the United States Patent Office.[2]

This section would certainly exclude registration of the ancient and internal masonic symbols registered under the Kansas Act by Prince Hall Lodge in the present case, and the courts have so held when similar cases arose. (*In re Mason Tire & Rubber Co.*, 11 F.2d 556; Nims—Unfair Competition and Trade-Marks, 4th Ed. 1947, sec. 229, page 754.) See also, *Re Excelsior Shoe Co.*, 40 App. D.C. 480, where the court, without referring to any trade-mark act, held on general principles that the name "Boy Scouts" was not registrable since it was the name of a well-known national organization.

Furthermore, without any reference to express federal statutory prohibitions, it is absolutely clear that a state statute which permits registration of a purely generic symbol by the first person who happens to apply, is grossly opposed to the general principles of law applicable to trade-marks as set forth in many decisions of the Supreme Court of the United States. (*Columbia Mill Company v. Alcorn*, 150 U.S. 460,

[2]Section 1052, Title 15, U.S.C.A. (Lanham Act—1946), the comparable section to the 1905 Act, does not contain the above provision; however, in *Academy v. Academy Award Products, Inc.*, 89 U.S.P.Q. 451, 454, it was held that the prohibition set forth in paragraph 5(b) of the 1905 Act could be properly raised at the present time even though the 1905 Act has been repealed by section 14(c) of the Lanham Act of 1946.

463.) This particular proposition will be greatly expanded under point (3) of this Jurisdictional Statement.

Article I, section 8 of the Constitution of the United States provides for federal legislation regarding the regulation of trade-marks. Congress has legislated pursuant to this provision and the highest court of the land has laid down appropriate guides on the subject. The often-repeated rule is that where Congress has acted within the authority of its granted powers and where at the same time, a state has a conflicting law, the federal legislation prevails over that of the state. (*Case v. Bowles,* 327 U.S. 92, 102.) A state cannot nullify congressional acts. (*Coca-Cola v. State* (Tex. Civ. App.), 225 S.W. 791, 793 [2].)

Therefore, since the Kansas Act arbitrarily granting a monopoly to the first registrant of a generic symbol is diametrically opposed to express federal legislation and every conceivable court-made rule (see point 3 of this Statement), it must be declared unconstitutional and void. (Art. VI, cl. 2, U. S. Constitution.)

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(2) STATE COURT DECISIONS ADJUDICATING THE CONSTITUTIONALITY OF STATUTES SIMILAR TO THE KANSAS REGISTRATION ACT ARE IN SHARP DISAGREEMENT WITH ONE ANOTHER.

Although the state court decisions in the general area involved here are scarce, the ones that are available are in a condition of irreconcilable discord. *For example, in State v. Holland, supra, 37 Mont. 393, 96*

Pac. 719, the Supreme Court of Montana found that state's registration act unconstitutional in that it violated the equal protection clause of the United States Constitution, and was an unlawful delegation of power to the various orders mentioned in the act. Whereas, in *Hammer v. State,* 173 Ind. 199, 89 N.E. 850, the Indiana court found a similar statute unobjectionable.

While the statute involved in the *Hammer* case was substantially different from the Kansas statute, and the facts of that case were dissimilar to those in the present case, the Supreme Court of Kansas relied solely and entirely upon it in upholding the conviction of the appellants here.

In the interest of securing a certain amount of uniformity in the decisions of the state courts, it is therefore felt that a determination by this court would be salutary.

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(3) AS APPLIED TO APPELLANTS, THE KANSAS REGISTRATION ACT DEPRIVES THEM OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

Appellants' basic argument is that the masonic symbols which they were accused of wearing, comprising a square and compass and a lambskin apron, are a part of everyday American life and are a generic designation for *all* masons, regardless of the color of their skin. (TR. 131, lines 12-25.) It is a well-known fact that these symbols were appropriated by masons all over the world hundreds of years before Prince Hall Lodge ever came into existence.

The Kansas Act declares, in effect, that any fraternal society may register any insignia it desires; that such registration shall entitle that society and its members to use the emblem throughout the State of Kansas; and that once an emblem is registered no other organization can use it (with one important exception which will be discussed later in this Statement). In short, it grants a monopoly to the first registrant without requiring him (or his organization) to show prior use or any right to use it at all.

There is no precept of federal or common law under which the *first registrant* of an international symbol can secure a monopoly in its use. (*Hygrade Food Products Corporation v. H. D. Lee Mercantile Co.*, 37 F.2d 900.) The right to a monopoly in the use of a name or symbol *grows out of its use* (*United Drug Co. v. Theo Rectanus Co.*, 248 U.S. 90; *Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co.*, 316 U.S. 203), and it has long been the rule that no person has a right to exclusively appropriate a symbol which others have an equal right to employ for the same purpose. (*Canal Company v. Clark*, 80 U.S. 311, 323, 324; *Corbin v. Gould*, 133 U.S. 308, 314; *General Shoe Corp. v. Rosen*, 29 F.Supp. 102; *Hercules Powder Company v. Newton*, 266 Fed. 169, 172 [2]; *San Francisco Ass'n for Blind v. International Aid for Blind, Inc.*, 58 F.Supp. 995, 998.)

Generally speaking, registration under federal acts creates a presumption of validity only and confers no substantive rights beyond what they would be under common law principles. Such registration merely gives

jurisdiction to United States courts and gives the registrant certain procedural advantages. (*May et al. v. Goodyear Tire & Rubber Co.,* 10 F.Supp. 249, 256 [1].) As pointed out by the court in *Coca-Cola Co. v. Stevenson,* 276 Fed. 1010, state statutes providing for registration of trade-marks are in affirmance of the common law and have no effect in giving them the quality of trade-marks if not already such. (page 1015 [5].)

Under the Kansas Registration Act which we are now examining, Prince Hall Lodge was the first to register a square and compass and a plain lambskin apron as the official emblems of that lodge. It was not asked to show that it had any right to the use of these emblems or that they were in any way capable of exclusive appropriation by any *one* lodge of masons.

It is absolutely clear under the comon law of trade-marks and federal enactments that the masonic symbols registered by Prince Hall are not any more capable of exclusive appropriation than any other arbitrary symbol, such as a cow, a horse, a star, etc. (*Southern California Fish Co. v. White Star Canning Co.,* 187 P. 981; *Socony-Vacuum Oil Co., Inc. v. Rosen,* 108 F.2d 632; *Reddy Kilowatt, Inc. v. Mid-Carolina Electric Cooperative, Inc.,* 240 F.2d 282; *Squirrel Brand Company v. Barnard Nut Co., Inc.,* 224 F.2d 840; *Patton Paint Co. v. Sunset Paint Co.,* 290 Fed. 323; *California Apparel Creators v. Wieder of California, Inc.,* 68 F.Supp. 499; *Hutchinson et al. v. Blumberg,* 51 Fed. 829; *Armour & Co. v. Louisville Provision Co.,* 283 Fed. 42; *Galena-Signal Oil Co. v.*

W. P. Fuller & Co., 142 Fed. 1002; *Star Bedding Company v. Englander Company, Inc.*, 239 F.2d 537; *Lawrence et al. v. P. E. Sharpless Co.*, 203 Fed. 762; *Hygrade Food Products Corporation v. H. D. Lee Mercantile Co.*, 46 F.2d 771.)

That appellants were entitled to wear and had a right to wear international masonic emblems was amply borne out by testimony elicited from several witnesses during the course of the trial. (TR. 116-164.) Apparently, they had been so wearing these emblems as far back as 1927 (TR. 127, line 12; TR. 130, lines 6-16) without molestation *outside* of the State of Kansas. There was no evidence in the record that appellants were not masons or that they were in any way attempting to deceive the public into believing that they were Prince Hall Masons. In fact, the information, which uses the language "and the Masonic organization to which they belong", concedes that there is no question about their being masons.

Therefore, since the uncontradicted evidence reveals that appellants are indeed lawfully constituted members of a recognized masonic organization, they have a valuable property right in the use and wearing of masonic symbols to identify themselves as masons. To deprive them of this right is, under our Constitution, a taking of their property without due process of law, and that is exactly what the Kansas Registration Act accomplishes. Appellants (or any other out-of-state masons) who have a perfect right to wear masonic emblems outside of the state, automatically become criminals when they have the temerity to cross

the Kansas state line while wearing their masonic pins, tie clasps, cuff links or even a plain lambskin apron. It is possible, under the statute, for a mason in this predicament to present evidence to prove that he has been using his masonic tie pin for twenty-five years prior to June, 1953, but as the present case demonstrates, he runs the risk of the jury's entirely ignoring his evidence. Appellants were convicted in spite of their overwhelming and uncontradicted showing of a peaceable twenty-five year use.

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(4) THE LAW UNDER WHICH APPELLANTS WERE PROSECUTED, HAVING NO CONCEIVABLE RELATION TO THE PROTECTION OF PUBLIC HEALTH, WELFARE, SAFETY OR MORALS, REPRESENTS AN IMPROPER EXERCISE OF THE STATE'S POLICE POWER.

In order for a state to lawfully exercise its police power, its enactments are limited to those subjects having reference to the public health, comfort, safety or welfare. It must not be arbitrary, unreasonable or go patently beyond the necessities of the case. and the means which it employs must have a real and substantial relation to the *object* sought to be attained. (*N.Y. Cent. R. Co. v. White,* 243 U.S. 188.)

At the outset, it must be pointed out that it is difficult to determine whether or not the Kansas Registration Act here under examination meets all or any of the above tests required of a valid exercise of the state's police power because its language simply does not recite that it has any purpose whatsoever.

It is fundamental that in order to meet the constitutional requirements as to definiteness and certainty in statutes, the intent of the Legislature must appear from the language of the statute itself, either expressly or by necessary implication. (*Feinglass v. Reinecke,* 48 F.Supp. 438, 441.) See also *Hurst v. Haak,* 73 OhioApp. 189, 55 N.E.2d 594, 596 [3], where it is said:

> "[E]ach enactment must be considered to determine whether it states *the purpose* which the legislature sought to accomplish and the standards by which that purpose is to be worked out with sufficient exactness to enable those charged with the enforcement of the law to understand these limits." (Emphasis added.)

Since the Kansas Registration Act apparently has no purpose, it is clear that it should fail because it is too vague and indefinite. (See discussion under point 6 herein.) Even by "necessary implication" it is almost impossible to determine why this act became law in the first place; however, for the sake of further argument, there is a possibility that a person seeking to understand the law might, by studying section 75-424, conclude that its purpose is to prevent fraud or deceit. Section 75-424 of the act announces that no registration will be granted for any insignia which is so similar to a previously registered insignia that it would be *"calculated to deceive."*

Impliedly, then the purpose of the law is apparently to prevent fraud. Obviously, the prevention of fraud or deceit is always a proper subject concerning

which a state may legislate, provided of course, such legislation bears a valid relation to public health, welfare, morals, or safety. *(State v. Ballance,* 229 N.C. 764, 51 S.E.2d 731; *People v. Van Dell,* 146 N.Y.S. 992.)

The Kansas Registration Act under which appellants were convicted presents an unusually striking example of a statute which, on its face, seemingly has (by implication, to be sure) an apparent reference to the public welfare, but which in truth is admittedly aimed at accomplishing a purely private purpose. The record of the case affords a convenient opportunity for this court to discover the real *purpose* of this law simply by an examination of the *testimony of the complaining witnesses* elicited during the presentation of the state's evidence. One P G. Porter, Grand Master of the Prince Hall Masons of Kansas Jurisdiction, testified that he was instrumental (TR. 30, lines 3-5 and 12, 13) in obtaining the passage of the Kansas Registration Act; that immediately after the law became effective, he registered the universal symbols of masonry (TR. 31, line 7); and that the sole "purpose" of the law was to *prevent the practice of masonry in "the wrong way in Kansas."* (TR. 49, line 25; 50, lines 1-2.)

A further examination of the record discloses that while the proceedings had in the trial court were in the nature of a criminal prosecution, this is actually a law suit initiated for the benefit of Prince Hall Lodge of Kansas to protect its monopoly in colored masonry in that state, and to prevent appellants'

lodge from functioning there. (TR. 8, lines 4-10.) To emphasize this point, a direct quotation from the opening statement on behalf of the state will suffice (TR. 8, lines 4-22):

> "Here within the last 8 years we have found that there were invasions of our jurisdiction, and the Negro Grand Lodge found it necessary to apply or petition the Legislature of the State of Kansas asking that they enact a law that would *prohibit other organizations and other Masons who are not of Prince Hall origin from wearing the button or the square and compass or any Masonic emblems.*
>
> . . . . . .
>
> "The evidence will show that the *group of Masons,* that are here before you as the defendants on trial, invaded the Jurisdiction of the Prince Hall Grand Lodge in the last 6 or 8 years, I am not sure. They claim to be, the evidence will show, the Scottish Rite Masons. As such, the evidence will show, they had no right to work only in the degrees from the Fourth Degree up to the Thirty-third Degree. They had no right under *our* law to wear any emblems of the Blue Lodge." (Emphasis added.)

Basically, then, the subject matter of this case involves a dispute over dogma between two masonic organizations, each claiming the right to practice masonry on the basis of authority contained in charters empowering them to do so.

As desirable as it may be that all negro masons practice masonry in accordance with certain rules, it

is manifestly outside the state's police power to attempt to regulate or in any way interfere in this very narrow sphere of *private* activity. (*State v. Ballance,* supra, 229 N.C. 764, 51 S.E.2d 731, 735.) The State of Kansas is actually declaring that it approves of the doctrines and principles of Prince Hall Lodge and that it shall hereafter be the official masonic lodge of the state. Any other masonic lodge shall be against the law! This law thus seems to not only grossly exceed the state's justifiable exercise of its police power, but also approaches the establishment of a state-protected system of faith or beliefs, thereby doing violence to our American theories of separation of church and state.

In any event, appellants can also demonstrate that it is not necessary to go behind the four corners of this statute to prove that its enactment is indefensible under the state's police power. For the following reasons, it will be seen that even though the law's declared purpose may be to prevent deceit and fraud, it is totally incapable of achieving this end because the means (giving monopoly to first registrant) has no substantial relation to that end:

(a) It is true under this act that an impostor or cheat *might be* punished, but it is also apparent, as the present case vividly illustrates, that it unjustly restricts harmless and worthwhile activities on the part of such persons as appellants. The record is completely devoid of any proof that appellants have ever done anything but practice masonry as authorized by their articles of incorporation. Their activities

are not inherently immoral or illegal except as the Kansas Registration Act makes them so.

(b) Had the Kansas Legislature really intended to prevent deceit and fraud, it would have provided that the organization which *first adopted* and *used* an emblem would be protected in its continued use. As it now stands, the law amounts to nothing more than a "race to the registry" with the loser automatically becoming a criminal if he thereafter wears the emblems of his lodge. The complaining witnesses admitted here that they had made absolutely sure of winning this race since a member of the Prince Hall Lodge was sitting on the doorstep of the office of the secretary of state waiting for word that the legislation had passed. (TR. 31, line 7.)

Under the act, any organization can register any insignia it desires whether or not an older organization, which had not registered it, had prior rights. Thus arises the possibility that a person not a mason could wear masonic emblems as against a person who is. Therefore, this act could operate as a vehicle for deceit rather than the prevention of it.

(c) The law is a substitute for a trade-mark law which gives Prince Hall Lodge the advantages and rights of a monopoly. Such a monopoly could not be obtained under federal trade-mark law or the common law of trade-marks since the symbols registered by Prince Hall are simply not capable of exclusive appropriation. (See points 1 and 3 herein.) The State of Kansas is, therefore, using its police power

to grant a monopoly to private individuals who would not otherwise be entitled to it.

(d) The law has no provision for satisfying the registration office that the insignia presented for registration rightfully belongs to the organization submitting it. This being the case, the Knights of Columbus of Kansas could compel the Secretary of State to register the universal symbols of masonry for their use (assuming they could beat the Prince Hall Lodge to the office), and there is very little anybody could do about it. It is almost amusing to contemplate the confusion in the mind of the general public if a known Knight of Columbus should suddenly begin wearing the square and compass of masonry on his lapel!

(e) This act is not even, on its face, addressed to the *punishment of fraud.* It is rather a prohibition against displaying certain emblems for fear fraud *may be* perpetrated. The Legislature might, with equal propriety, pass an act prohibiting the practice of Christian Science because some unscrupulous person *may* perpetrate a fraud. Counsel for appellants suggest that the thing to do is to prohibit and punish the fraud. (*People v. Van Dell,* 146 N.Y.S. 992, 994 et seq.)

(f) Finally, the twenty-five year proviso of section 75-424 completely negatives any chance that registration of a symbol could give constructive notice to the public as to what is the property of others. This section provides that organizations which have been using their symbols for over twenty five years

prior to June 1953 do not have to register in order to be entitled to display them. It, thus, does violence to the well-recognized rule that registration statutes merely furnish a method for spreading on the records the evidence of already existing rights. (*Pulitzer Pub. Co. v. Houston Printing Co.,* 4 F.2d 924, 927 [6].) If a member of the public wanted to be sure that the man he sees wearing a masonic pin is a mason, he cannot ascertain it from consulting the records of the secretary of state. Perhaps he is an impostor who managed to register the pin before anybody else; or, he may be an authentic mason who is wearing the pin by virtue of his twenty-five year use and thus not required to register the emblems.

From the above, it is evident that the Kansas Registration Act is wholly outside of the valid exercise of the police power of that state because its real purpose has no connection with the public welfare; it is not directed toward any real evil, actual or threatened; it is arbitrary, unreasonable and patently beyond the necessities of the case; and the means which it employs have no real or substantive relation to the object sought to be attained.

(5) THE KANSAS REGISTRATION LAW DENIES APPELLANTS THE EQUAL PROTECTION OF THE LAWS ASSURED TO THEM BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BECAUSE IT GRANTS SPECIAL PRIVILEGES TO ONE GROUP OF MASONS AND DISCRIMINATES AGAINST APPELLANTS WHO ARE EQUALLY SITUATED.

A state, by legislation, may not arbitrarily confer upon one class of persons (just because their lodge registered certain emblems) benefits from which citizens in a like situation are excluded. (*Little v. Smith,* 124 Kan. 237, 257 Pac. 959, 961.)

The general guiding principle of the constitutional guaranty of the equal protection of the laws is that all persons similarly circumstanced shall be treated alike in both privileges conferred and liabilities imposed. This principle, of course, does not forbid classification, but any attempted classification must always rest upon some *real difference* which bears a reasonable and just relation to the act in respect to which the classification is imposed. (*Gulf, Colorado & Santa Fe Ry. v. Ellis,* 165 U.S. 150, 155.)

Appellants challenge the classification imposed by the Kansas Act as being unreasonable and frivolous—it simply offends plain standards of common sense! (*Hartford Co. v. Harrison,* 301 U.S. 459, 462.) In terms of equal protection of the laws, it is offensive because:

(a) It grants a monopoly in the wearing of a universal emblem to the first registrant in the State of Kansas. We are unable to see how it can be successfully maintained that a right can belong exclusively or

solely to the first Kansas masonic group that registers a symbol, when the same right is shared by all masons outside of the state. (*State v. Hagen,* 6 Ind. App. 167, 33 N.E. 223, 226.)

Under the Kansas statute, a person belonging to, say, an Indiana masonic organization, for any period less than twenty-five years, can wear his masonic tie pin, comprised of a square and compass, as much as he wishes in the State of Indiana or any other state, as long as he is a mason in good standing. However, the minute he steps over the state line of Kansas, he automatically becomes an outlaw. Either he gives up the right to wear his tie pin, or he gets arrested. What simpler and more glaring instance of unreasonable classification can there be?

(b) The twenty-five year proviso of section 75-424 is an unreasonable exception in favor of persons who occupy exactly the same position as appellants except that they have used the masonic emblem for an arbitrary number of years as set forth in the statute.

Section 75-424 of the Kansas Act reads, in part, as follows: "No registration shall be granted to any association . . . having . . . an emblem [similar to one already registered by another organization] . . . *Provided,* that nothing contained in this act shall deny the use of any emblem, to any organization which has been peacefully using the same for a period of twenty-five years or more prior to the date of this enactment."

Appellants urge that there can be no reasonable classification of citizens based upon the wearing of an ancient symbol for twenty-five years rather than,

say, twenty-four years because such classification bears no possible relation to the supposed object of the legislation, i.e. to prevent fraud.

In State v. Holland, 37 Mont. 393, 96 Pac. 719, the Supreme Court of Montana was confronted with a similar example of discrimination in the form of a statute which declared that any person who wilfully wore, without proper authority, the badge of certain named organizations would be guilty of a misdemeanor. The act further provided that its provisions did not apply to the wives, daughters, sisters, or mothers of members of those orders which were in good standing. The defendant was found guilty of a misdemeanor in that he wore the insignia of the Protective Order of Elks without being authorized to do so. He attacked the Montana law as being unconstitutional for the reason that it made an arbitrary classification of citizens. The court held that the act violated the equal protection of the laws provision of the United States Constitution, pointing out that the exception in favor of the wives, daughters, sisters and mothers of members was for purely sentimental reasons since the women who were excepted from the operation of the law bore exactly the same relation towards the subject of the legislation as all other women in the community, as well as men who were not members of any of the named societies.

The Montana court concluded that the Legislature cannot arbitrarily prohibit the use of an article to one person, leaving another at liberty to use it as he pleases.

The views set forth in the Holland decision apply with equal force to the problem presented in this case. However, in the light of one of the complaining witnesses testimony that "we don't want Masonry to be practiced the wrong way in Kansas" (TR. 49, line 25), it seems clear that the classification was not based upon pure sentiment, but was rather an indirect way to strike down appellants' lodge.

It cannot be doubted, therefore, that, as applied to appellants, the Kansas Act results in a useless and arbitrary classification by way of granting an unlawful monopoly to Prince Hall Lodge.

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(6) THE KANSAS REGISTRATION ACT IS UNCONSTITUTIONAL BECAUSE IT LAYS DOWN NO PROPER LEGISLATIVE STANDARD TO MAKE IT POSSIBLE FOR A CITIZEN TO DETERMINE WHEN HE IS SUBJECT TO ITS PENALTIES.

It is a long-established principle of constitutional law that a penal statute must be sufficiently explicit to enable a person of ordinary intelligence to understand its provisions. This rule requires that the statute provide a standard or guide by which it can be determined whether the doing of a particular act is prohibited (*Martin v. United States,* 100 F.2d 490, 493, 494 [1-4]), otherwise it amounts to an invalid delegation of legislative power. (*State v. Fowler,* 94 Fla. 752, 114 So. 435.)

The Kansas Registration Act is subversive of this principle because a person of ordinary intelligence could not possibly ascertain by an examination of the

statute whether or not the wearing of a particular symbol is prohibited. Rather, he would have to examine the constitution, by-laws, rules and regulations of one or more societies (section 75-427), perhaps secret in nature, to which only members can gain access. Thus, the guilt of the citizen is made to depend, not upon a prohibition to wear or use a particular thing described in the statute, but upon information which he must himself supply by inquiry from sources to which he, in many instances, is denied access. In this connection, the attention of this court is directed to the testimony of one of the complaining witnesses who stated (TR. 8, lines 21, 22): "They [appellants] had no right *under our law* to wear any emblems of the Blue Lodge." (Emphasis added.) Since the lodge of the complaining witnesses is secret in character, it is inescapable that appellants would have a very difficult task to determine whether or not they had any right "under our law" to wear or not to wear the masonic emblems registered by Prince Hall Lodge.

A further objection to the Kansas Act on this ground is that the insignia of fraternal societies are subject to change from time to time. To avoid the penalty of the statute, a citizen, whether a member of any other society or not, must keep himself informed of these changes or he will be liable to the penalty. (*State v. Holland,* supra, 37 Mont. 393, 96 Pac. 719, 722.) Obviously, the immunity of the citizen is not to be made dependent upon a permissive rule or regulation of a society of which he has no knowledge and can obtain none.

Finally, as stressed under point 4 of this Statement, the act is objectionable because its protective features could apply to any association which devised some sort of insignia. Upon presenting such insignia for registration, the state official would be compelled to accept it for registration if this particular group were the first to present it. No safeguards are provided to insure that the particular insignia has any connection with the purpose of the organization, *nor is any standard provided to insure that the insignia or emblem has not in fact been borrowed from some other organization of long standing.*

In short, the Kansas Legislature declared the prohibition and provided the penalty for its violation, but left it to different societies to supply by declaration in their secret work from time to time, as their varying choice might dictate, the description of the articles themselves. It is clearly too vague and incomplete as a law in itself to become the instrument for the prosecution of the appellants.

The Opinion of the Supreme Court of Kansas.

In their appeal before the Supreme Court of Kansas, appellants raised all of the questions which they are here presenting to the Supreme Court of the United States. However, the opinion of the Kansas court utterly ignores the contentions of appellants, and summarily disposes of the appeal by relying entirely on the case of *Hammer v. State,* supra, 173 Ind. 199, 89 N.E. 850, a case whose facts are vastly dissimilar from those in the present case.

The Kansas court's disregard for the controlling difference in the facts of the two cases makes it necessary to here reiterate that appellants *are masons* (TR. 125 et seq.) who belong to a masonic lodge incorporated under an Act of Congress over sixty years ago (TR. 106), and they have been wearing masonic badges for many years prior to the present prosecution. (TR. 152, lines 4-12.) Nowhere in the record can one find the slightest intimation that appellants are *not* members of their masonic lodge. There was some attempt to inquire into the early origin of appellants' lodge, but the purpose of this inquiry is not clear since they were only tried for wearing emblems that were registered by somebody else. All of the evidence concerning the authenticity of the lodges was improperly admitted because it was irrelevant and based upon hearsay. However, in the final analysis, the only matters which the jury had to pass upon were those based upon such immaterial evidence. The appellants admitted that they were not the first to register so there was actually no jury question in the first place.

Contrast this situation with the *Hammer* case. There, the defendant was charged with unlawfully wearing the badge and emblem adopted by an incorporated secret society of the state, he not at the time being a member of *that society*.

Moreover, the statute involved in the *Hammer* case is far removed from the Kansas Registration Act. It prohibited the wearing of the badge of a secret society by a nonmember, and the court pointed out that the *object* of the legislation was the prevention of fraud.

It did no more than make a misdemeanor of that which at common law was indictable as a "cheat."

Thus the defendant's conviction in the *Hammer* case was predicated upon a statute which codified the common law, i.e. false impersonation. Such a statute had a valid public purpose under which a state can lawfully exercise its police power, and it seems that the means employed accomplished the desired result because the defendant was prevented from deceiving the public into believing he was a member of the complainant organization.

On the other hand, the Kansas act turns on *who registers first*—it makes no difference if the registrant has any right to the registered insignia or not. Its purpose can only be guessed at. The end result of the law is that persons who have a perfect right to wear an emblem will end up in a criminal court, while the public will be grossly deceived instead of preserved from deceit.

Aside from the above differences in the two cases, the *Hammer* case is lastly objectionable for the reason that it is premised on completely discredited concepts of constitutional law. We call this court's attention particularly to the Indiana court's views on the exercise of the police power versus the Fourteenth Amendment:

> "In the Civil Rights Cases, 109 U.S. 3, it was held that the fourteenth amendment did not control the conduct of private persons, but of the states, and was not applicable to a regulation by a private person for the conduct of his business, though

of a quasi public character. *And it is held that the states may provide for separate schools, separate locations in theaters, and separate cars for white and colored people.*" (Cases cited.) (Emphasis added.)

The affirmation of appellants' conviction by the Supreme Court of Kansas is, therefore, flagrantly erroneous and without proper authority.

Appellants believe that the constitutional infirmities pointed out in the six points here presented render the act completely invalid and void; and that the questions raised in this appeal are substantial and are of public importance.

Dated, San Francisco, California,
January 28, 1959.

Respectfully submitted,

LEWIS, FIELD, DEGOFF & STEIN,
By MARVIN E. LEWIS,
Attorneys for Appellants.

(Appendices Follow.)

Appendix A

JOURNAL ENTRY OF JUDGMENT.

Now on this 2 day of May, 1957, the matter of imposing sentence and entering judgment upon and against the defendants above named comes on for hearing, the plaintiff appearing by Donald E. Martin, the duly elected, qualified and acting County Attorney of Wyandotte County, Kansas, James P. Davis, Assistant County Attorney, and Prentice A. Townsend, Special Prosecutor. The defendants, H. B. Turner, Arthur L. Sweeney, P. C. Copeland and Peter L. Menser, appear in person and by their attorney, Thomas E. Joyce.

The court after hearing the matters and things presented by counsel for the state and the defendants, and being fully advised in the premises, finds:

1. That on the 28th day of March, 1956, an information was filed by the County Attorney in the office of the Clerk of the District Court charging the defendants, H. B. Turner, Arthur L. Sweeney, P. C. Copeland and Peter L. Menser, with the commission of the crime of displaying and wearing emblems of a Masonic organization in violation of Sections 75-421 and 75-427 inclusive, G. S. Kansas Supp. 1955.

2. That on the 15th day of November, 1956, trial by jury was duly commenced, and on the 19th day of November, 1956, the jury found the defendants, H. B. Turner, Arthur L. Sweeney, P. C. Copeland and Peter L. Menser, guilty of the crime of wearing and dis-

playing emblems of a Masonic organization in violation of Sections 74-421 and 75-427 inclusive, General Statutes of Kansas Supp. 1955, and on the 20th day of November, 1956, the defendants, H. B. Turner, Arthur L. Sweeney, P. C. Copeland and Peter L. Menser, filed a motion for a new trial in the office of the Clerk of the District Court, which motion was continued by the court on its own motion for the reason that the date on which said motion was set for hearing the court was engaged in a trial of a jury case and was unable to entertain said motion, and that on the 12th day of January, 1957, said motion was duly and regularly presented to, heard and overruled by the court.

3. That the defendants were duly represented by counsel throughout and during the trial of said cause, counsel for the defendants being Thomas E. Joyce.

Wherefore, It Is Considered, Ordered, Adjudged and Decreed that the defendants, M. B. Turner, Arthur L. Sweeney, P. C. Copeland and Peter L. Menser, be and they are hereby fined the sum of $5.00 each for the commission of the crime of wearing and displaying emblems of a Masonic organization in violation of Sections 75-421 and 75-427 inclusive, G. S. of Kansas Supp. 1955, sentence being imposed by authority of and in accordance with Section 21-1308 of the General Statutes of 1949, and any amendments thereto, and the defendants to pay the costs of this action, which are in the sum of $.....

No. 40,819

IN THE

SUPREME COURT OF THE STATE OF KANSAS

THE STATE OF KANSAS,
Appellee,

v.

H. B. TURNER, ARTHUR L. SWEENEY, P. C. COPELAND and PETER L. MENSER,
Appellants.

SYLLABUS BY THE COURT.

1. Matter specified as error, in order to be reviewable, must be within the purview of those matters contained in the notice of appeal, and, when an appellant seeks to have this court review alleged trial errors, he must appeal from the order overruling his motion for a new trial, and, in addition, must specify such ruling as error.

2. The federal constitution grants affirmatively to no person a right to wear the badge of insignia of a secret society.

3. The regulation of the wearing and display of badges or insignia of secret societies as a matter for the state in the exercise of its police powers, and no constitutional privileges or immunities are denied a citizen by a statute forbidding him to wear or display

the badge or insignia of a secret society of which he is not a member, nor are exclusive privileges unlawfully conferred by such legislation.

Appeal from Wyandotte district court, division No. 3; Harry G. Miller, Jr., judge. Opinion filed August 1, 1958. Affirmed.

Albert M. Ross, of Kansas City, and *Marvin E. Lewis,* of San Francisco, California, argued the cause, and *Joseph Cohen, Charles S. Schnider, John E. Shamberg* and *Joseph P. Jenkins,* all of Kansas City, and *Martin E. Field, Sidney F. DeGoff* and *Pierce N. Stein,* all of San Francisco, California, were with them on the briefs for the appellants.

James P. Davis, Assistant County Attorney, *William H. Towers,* of Kansas City, and *Prentice A. Townsend,* of Topeka, argued the cause, and *John Anderson, Jr.,* Attorney General, and *Donald E. Martin,* County Attorney, were with them on the briefs for the appellee.

The opinion of the court was delivered by

PRICE, J.: Defendants were found guilty by a jury of violating the provisions of what now appears as G.S. 1957 Supp., 75-427. Each was ordered to pay a fine of $6.00 and the costs of the action, and this appeal followed.

Due to the nature of the case, it will be necessary to set out or summarize the provisions of Chapter

397, Laws of 1953, relating to the registration of names and insignia of certain organizations, now appearing as G.S. 1957 Supp., 75-421 to 427, inclusive. Unless otherwise indicated, all references are to G.S. 1957 Supp.

75-421 provides:

"Any association, lodge, order, fraternal society, beneficial association, or fraternal and beneficial society or association, historical, military or veterans' organization, labor union, foundation, federation, or any other society, organization or association, degree, branch, subordinate lodge or auxiliary thereof, whether incorporated or unincorporated, may register in the office of the secretary of state, a facsimile, duplicate or description of its name, badge, button, decoration, charm, emblem, rosette or other insignia, and may by reregistration, alter or cancel the same."

75-422 provides:

"Application for such registration shall be made by the chief officer or officers of said association, lodge, order, fraternal society, beneficial association or fraternal and beneficial society or association, historical, military or veterans' organization, labor union, foundation, federation, or any other society, organization or association, degree, branch, subordinate lodge or auxiliary thereof, upon blanks to be provided by the secretary of state, and such registration shall be for the use, benefit and on behalf of all associations, degrees, branches, subordinate lodges and auxiliaries of said association, lodge, order, fraternal

society, beneficial association, or fraternal and beneficial society or association, historical, military or veterans' organization, labor union, foundation, federation, or any other society, organization or association, degree, branch, subordinate lodge or auxiliary thereof and the individual members and those who thereafter become members thereof throughout the state of Kansas."

75-423 provides that the secretary of state shall keep a properly indexed record of the registrations provided for, which record shall also show any altered or canceled registration.

75-424 provides:

"No registration shall be granted to any association, lodge, order, fraternal society, beneficial association, or fraternal and beneficial society or association, historical, military, or veterans' organization, labor union, foundation, federation, or any other society, organization or association, degree, branch, subordinate lodge or auxiliary thereof, having a name, badge, button, decoration, charm, emblem, rosette or other insignia similar to, imitating or so nearly resembling as to be calculated to deceive, any other name, badge, button, decoration, charm, emblem, rosette or other insignia whatsoever, already registered pursuant to the provisions of this act: *Provided,* that nothing contained in this act shall deny the use of any emblem, name, badge, button, decoration, charm, rosette or other insignia to any organization which has been peaceably using the same for a period of twenty-five years or more prior to the date of this enactment."

75-425 provides that upon granting registration the secretary of state shall issue his certificate to the petitioners showing that a search of his records fails to disclose any conflict between the name, badge, button, decoration, charm, emblem, rosette or other insignia proposed to be registered, and any other name, badge, button, decoration, cnarm, emblem, rosette or other insignia registered pursuant thereto.

75-426 provides for the fee to be charged by the secretary of state for each registration made pursuant to the act.

75-427 provides:

> "Any person who shall willfully wear, exhibit, display, or use for any purpose, the badge, button, decoration, charm, emblem, rosette or other insignia of any such association or organization herein mentioned, duly registered hereunder, unless he or she shall be entitled to use and wear the same under the constitution and by-laws, rules and regulations of such association and organization, shall be guilty of a misdemeanor, and upon conviction shall be punished as provided in section 21-1308 of the General Statutes of 1949 and any amendments thereto."

G.A. 1949, 21-1308 (enacted in 1903) provides:

> "Any person who shall willfully wear the badge, insignia, button, uniform or other emblem of the Independent Order of Odd Fellows, the Ancient, Free and Accepted Masons, the Knights of Pythias, or other secret and fraternal beneficiary societies, or who shall use the same to obtain aid or assistance within this state, unless he

shall be entitled to use and wear the same under the laws, rules and regulations of the grand lodges of said orders in the state of Kansas, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not to exceed twenty-five dollars, or by imprisonment not to exceed thirty days, or by both such fine and imprisonment."

The information upon which defendants were tried charged:

". . . that at said County of Wyandotte, State of Kansas, within the jurisdiction of this Court, on or about the 1st day of October, 1955, in Kansas City, Wyandotte County, Kansas, H. B. Turner, Arthur L. Sweeney, P. C. Copeland and Peter L. Menser, did wilfully and unlawfully wear, exhibit, display and use for the purpose of misleading and confusing the public, a name, badge, button, decoration, charm, emblem, rosette and other insignia of the Prince Hall Grand Lodge of Kansas and Jurisdiction F. and A.M., an incorporated fraternal society of Kansas, this same having already been duly registered pursuant to the provisions of Sections 75-421 and 75-427 inclusive, G. S. of Kan. Supp. 1953; that the said defendants, H. B. Turner, Arthur L. Sweeney, P. C. Copeland and Peter L. Menser, and the Masonic organization to which they belong has not been peaceably using the emblem, name, badge, button, decoration, charm, rosette, or other insignia for a period of twenty-five (25) years or more, and all of said unlawful actions done as aforesaid, while the said H. B. Turner, Arthur L. Sweeney, P. C. Copeland and Peter L. Menser

were not members of nor entitled to use and wear the same, under the Constitution, and by-laws, rules and regulations of the said Prince Hall Grand Lodge of Kansas and Jurisdiction F. and A.M., an incorporated fraternal society of Kansas, contrary to the statute in such case made and provided."

At the close of the state's evidence the trial court sustained defendants' motion for discharge insofar as their use of a "name" similar to the Prince Hall organization was concerned. Defendants introduced their evidence and the case was submitted to the jury on the question whether defendants had violated the provisions of the statute by "wearing and displaying a Masonic emblem and apron which had been duly registered by the Prince Hall Grand Lodge in accordance with said statutes."

As stated, a verdict of guilty was returned. Defendants filed a motion for a new trial containing nineteen grounds, most of which had to do with alleged errors and irregularities during the trial. This motion was overruled and sentence, as heretofore mentioned, was imposed.

Defendants' notice of appeal reads that they ". . . have and do hereby appeal to the Supreme Court of Kansas from the judgment rendered on a verdict returned by a jury in the above entitled action, on the 22nd day of May, 1957, whereby it was by the District Court of Wyandotte County, Kansas, decided, ordered and adjudged that defendants were guilty of a violation of Sections 75-421 to 75-427 inclusive, G. S. Sup-

plement 1953, and whereby the court fined $5.00 each and costs."

Defendants assert nine specifications of error, one of which is that the court erred in overruling their motion for a new trial.

It is to be noted, however, that they did not appeal from the order overruling the motion for a new trial. Therefore, despite their assignment of that order as error, alleged errors and irregularities occurring during the trial, that is, trial errors, are not reviewable. Application of this rule has been invoked under varying facts and circumstances. The most frequent instance is where an appeal is taken from the order overruling a motion for a new trial, but an appellant neglects to assign such ruling as error in his specifications of error. Here we have just the reverse, but the end result is the same and amounts simply to this—matters specified as error, in order to be reviewable, must be within the purview of those matters contained in the notice of appeal, and when an appellant seeks to have this court review alleged trial errors he must appeal from the order overruling his motion for a new trial, and, in addition, must assign such ruling as error. We cite but a few of our decisions on the subject—*Hardman Lumber Co. v. Spitznaugle,* 130 Kan. 346, 286 Pac. 235; *In re Estate of Young,* 169 Kan. 20, 217 P. 2d 269; *Crowder v. Lindbergh,* 175 Kan. 671, 265 P. 2d 851; *McCarty v. Kansas-Nebraska Natural Gas Co.,* 176 Kan. 386, 389, 271 P. 2d 264; *Baker v. Maguire's, Inc.,* 176 Kan. 579, 580, 272 P. 2d 739; *State, ex rel. v. Miller,* 177 Kan. 324, 279 P. 2d 223,

52 A.L.R. 2d 691, and *King v. King,* 183 Kan. 406, 408, ... P. 2d ..... The rule is equally applicable to appeals in criminal cases and thus precludes our review of alleged trial errors in the case before us.

Application of the rule does not, however, prevent a review of pure questions of law (see *State, ex rel. v. Miller,* supra, at pp. 329, 330).

At the close of all of the evidence defendants moved for discharge on several grounds, one of which was that "the law under which the prosecution in this case is had is violative of the rights of the defendants under the Constitution of the United States and the Fourteenth Amendment thereof." The same general contention was included in the motion for a new trial and the specifications of error.

Defendants' brief likewise deals in generalities, but, if we understand their position correctly, it is to the effect the statutes in question deprive defendants' organization of its property without due process of law and amount to an unlawful exercise of the police power of the state. Some reference also is made to the first amendment to the federal constitution. (See *Sester v. Belvue Drainage District,* 162 Kan. 1, 6, 173 P. 2d 619, in which it was said that the first ten amendments to the federal constitution are limitations only on the power of the federal government and do not apply to the state.)

Be that as it may, we nevertheless will discuss briefly the apparent contention of defendants insofar as section 1 of the fourteenth amendment to the federal constitution is concerned.

The case of *Hammer v. State* (1909), 173 Ind. 199, 89 N.E. 850, also reported at 24 L.R.A. (NS) 795, 140 Am.St. Rep. 248, 21 Ann.Cas. 1034, is perhaps the leading case on the subject. There the defendant was charged with unlawfully wearing the badge and emblem adopted by an incorporated secret society of the state, he at the time not being a member of the society. He was convicted and fined. On appeal to the Indiana supreme court it was contended, among other things, that the law under which the prosecution was had was violative of the fourteenth amendment to the constitution. In rejecting this contention it was held that no constitutional privileges or immunities are denied a citizen by a statute forbidding him to wear the badge of a secret society of which he is not a member, nor are exclusive privileges unlawfully conferred by such legislation, and that the legislature may under its police power pass such legislation. In the course of the opinion it was said:

> "It can scarcely be urged that the right to wear a badge or emblem of a society of which a person is not a member is a right conferred by the Constitution or laws of the United States. The statute confers no right, exemption or privilege on any class or individual to do a thing denied to others as of common right, except it may be said negatively to authorize one who is a member of the society to wear a badge if he chooses, but prevents all who are not members from doing so. The Constitution and laws of the United States do not furnish, nor guarantee such right, nor can a person under them claim that right as a privilege, or that he shall be immune from regulation by the

State, so far as the federal Constitution is concerned. It is simply the denial by the State, under its police power, of a claim of a right by appellant. It is the negation of a claim, and is a matter that concerns the State only." (p. 203.)

". . . It is a matter of common knowledge that the membership in most, if not all, societies or organizations, whether secret or otherwise, is the result of fitness and selection, which give members standing and character, at least among their fellows, and to a greater or lesser degree with the public and he who wears a badge or emblem of the order or society without being a member holds himself out to the public and to actual members as guilty of a false personation. It is of itself a deceit and a false pretense, and its object could be nothing else than deception, with possibly ulterior motives . . . and the object of the statute was the prevention of this species of fraud, not only in the interest of the members of the society, but of the public at large, who might be deceived through their good opinion of the society and its members. It is a police regulation, pure and simple, upon grounds of public policy, directed against false personation and false pretenses of that particular kind." (pp. 205, 206.)

See also 4 Am. Jur., Associations and clubs, §38, p. 479; 22 Am. Jur., False Pretenses, §77, p. 486, and annotations found at 43 A.L.R. 914, and 62 A.L.R. 798.

We agree with the holding of the supreme court of Indiana, and, there being no decision of this court to the contrary, believe that it should be followed in the case before us. The judgment is therefore affirmed.

Appendix B

SECTIONS 75-421 TO 75-427, INCLUSIVE, G.S., 1955 SUPP. TO G.S. 1949 (LAWS OF KANSAS, PAGE 615).

75-421. Names and insignia of certain organizations; registration. Any association, lodge, order, fraternal society, beneficial association, or fraternal and beneficial society or association, historical, military or veterans' organization, labor union, foundation, federation, or any other society, organization or association, degree, branch, subordinate lodge or auxiliary thereof, whether incorporated or unincorporated, may register in the office of the secretary of state, a facsimile, duplicate or description of its name, badge, button, decoration, charm, emblem, rosette or other insignia, and may by reregistration, alter or cancel the same. [L. 1953, ch. 397, § 1; June 30.]

75-422. Same; application; effect of registration. Application for such registration shall be made by the chief officer or officers of said association, lodge, order, fraternal society, beneficial association or fraternal and beneficial society or association, historical, military or veterans' organization, labor union, foundation, federation, or any other society, organization or association, degree, branch, subordinate lodge or auxiliary thereof, upon blanks to be provided by the secretary of state, and such registration shall be for the use, benefit and on behalf of all associations, degrees, branches, subordinate lodges and auxiliaries of said association, lodge, order, fraternal society, beneficial association, or fraternal and beneficial society or association, historical, military or veterans' organiza-

tion, labor union, foundation, federation, or any other society, organization or association, degree, branch, subordinate lodge or auxiliary thereof and the individual members and those who thereafter become members thereof throughout the state of Kansas. [L. 1953, ch. 397, § 2; June 30.]

75-423. Same; record. The secretary of state shall keep a properly indexed record of the registrations provided for by this act, which record shall also show any altered or canceled registration. [L. 1953, ch. 397, § 3; June 30.]

75-424. Same; exceptions. No registration shall be granted to any association, lodge, order, fraternal society, beneficial association, or fraternal and beneficial society or association, historical, military, or veterans' organization, labor union, foundation, federation, or any other society, organization or association, degree, branch, subordinate lodge or auxiliary thereof, having a name, badge, button, decoration, charm, emblem, rosette or other insignia similar to, imitating or so nearly resembling as to be calculated to deceive, any other name, badge, button, decoration, charm, emblem, rosette or other insignia whatsoever, already registered pursuant to the provisions of this act: *Provided,* That nothing contained in this act shall deny the use of any emblem, name, badge, button, decoration, charm, rosette or other insignia to any organization which has been peaceably using the same for a period of twenty-five years or more prior to the date of this enactment. [L. 1953, ch. 397, § 4; June 30.]

75-425. Same; certificate of registration. Upon granting registration as aforesaid, the secretary of

state shall issue his certificate to the petitioners, showing that a search of his records fails to disclose any conflict between the name, badge, button, decoration, charm, emblem, rosette or other insignia proposed to be registered, and any other name, badge, button, decoration, charm, emblem, rosette or other insignia registered pursuant thereto. [L. 1953, ch. 397, § 5; June 30.]

75-426. Same; fee; disposition of moneys. There shall be paid to the secretary of state for each registration made by him and certificate thereof issued, pursuant to the provisions of this act, and for each search made by him and certificate thereto issued, in pursuance of the provisions of this act, the sum of five dollars ($5), which shall be paid at the time the registration or search is applied for; all sums paid to the secretary of state for registrations and searches in pursuance of the provisions of this act shall be paid into the general fund of this state and become a part of said fund. [L. 1953, ch. 397, § 7; June 30.]

75-427. Same; penalty. Any person who shall willfully wear, exhibit, display, or use for any purpose, the badge, button, decoration, charm, emblem, rosette or other insignia of any such association or organization herein mentioned, duly registered hereunder, unless he or she shall be entitled to use and wear the same under the constitution and bylaws, rules and regulations of such association and organization, shall be guilty of a misdemeanor, and upon conviction shall be punished as provided in section 21-1308 of the General Statutes of 1949 and any amendments thereto. [L. 1953, ch. 397, § 6; June 30.]

Appendix C

MOTION FOR NEW TRIAL.

Come now the defendants, jointly and severally, and move the Court to vacate the verdict of guilty as to each defendant rendered by the jury in this action on the 19th day of November, 1956, and to grant defendants a new trial of this action for the following reasons:

1. Abuse of discretion by the Court.

2. Misconduct of the jury.

3. Misconduct of the prevailing party.

4. Accident and surprise which ordinary prudence could not have guarded against.

5. Erroneous rulings of the Court.

6. Erroneous instructions given by the Court.

7. The verdict was given under the influence of passion and prejudice.

8. The verdict is in whole or in part contrary to the evidence.

9. Newly discovered evidence, material for said defendants, and which they could not, with reasonable diligence, have discovered and produced at the trial.

10. The Court admitted illegal testimony.

11. The verdict was decided by means other than a fair expression of opinion on the part of all of the jurors.

12. The verdict is contrary to the law.

13. The verdict is contrary to the evidence.

14. The facts proved by the evidence do not constitute a public offense.

15. The statutes upon which the information in this cause is based and under which this cause was prosecuted are unconstitutional and infringe the rights of defendants and the Masonic organizations to which they belong under the Constitution of the United States and amendments thereto.

16. The rights of the defendants to establish subordinate Masonic lodges and to use and wear the Masonic emblem of the square and compass with the letter, "G", is derived from the United Supreme Council of the Ancient Accepted Scottish Rite for the 33° and Last Degree of Free Masonry, for the Southern and Western Masonic Jurisdiction U. S. A., Grand Orient, Washington, D. C., a fraternal order incorporated under an act of Congress providing for the creation of corporations in the District of Columbia, and is a federal right which the statutes under which the prosecution was had in this action and which this action denied to defendants, and therefore the proceedings in this action and the statutes under which the same was had denied to defendants their constitutional rights and said statute is unconstitutional and void.

17. The statute under which this prosecution was had in effect gives the Prince Hall Grand Lodge of Kansas and its subordinate lodges a copyright (or trademark) on the Masonic emblem consisting of the square and compass with the letter, "G", when a

copyright (or trademark) could not be registered or effected under the acts of Congress governing copyrights and trademarks for the reason that such Masonic emblem has been in common use for so long by various Masonic lodges that the same could not become the subject of a copyright or trademark under the congressional enactments governing copyrights and trademarks enacted by Congress under the authority delegated to Congress by the Constitution of the United States, and therefore the act under which this prosecution was had is unconstitutional.

18. William H. Towers, special prosecutor for the State, after he withdrew as such special prosecutor, and testified for and on behalf of the state, continued to sit at the counsel table and to approach the bench and participate in arguments to the Court on objections made to the introduction of evidence, all of which was to the prejudice of these defendants for the reason that under the Code of Ethics governing the conduct of lawyers, he was, in the eyes and sight of the jury, still actively participating in the conduct of the State's case.

19. Counsel for the State made improper arguments to the jury to the prejudice of these defendants, particularly when counsel for the State in argument referred to the fact that the defendants, Arthur L. Sweeney and Peter L. Menser, did not testify in their own behalf when reference was made to the fact that the State's testimony against them was uncontradicted but was not uncontradicted as to the defendants, H. B. Turner and P. C. Copeland, who took the stand in their own behalf.

Appendix D

NOTICE OF APPEAL TO SUPREME COURT.

To Donald Martin, County Attorney of Wyandotte County, Kansas:

Take notice that the defendants, H. B. Turner, Arthur L. Sweeney, P. C. Copeland and Peter L. Menser, in the above entitled action, have and do hereby appeal to the Supreme Court of Kansas from the judgment rendered on a verdict returned by a jury in the above entitled action, on the 22nd day of May, 1957, whereby it was by the District Court of Wyandotte County, Kansas, decided, ordered and adjudged that defendants were guilty of a violation of Sections 75-421 to 75-427 inclusive, G. S. Supplement 1953, and whereby the court fined $5.00 each and costs.

Dated this 22nd day of May, 1957.

H. B. Turner,
Arthur L. Sweeney,
P. C. Copeland,
Peter L. Menser,
By Cohen, Schnider, Shamberg, Joyce, Jenkins & Ross.

Service of a copy of the above and foregoing notice is hereby acknowledged this the ..... day of May, 1957.

Donald C. Martin,
County Attorney.

SPECIFICATIONS OF ERROR.

The Court erred:

1. In overruling the motion of the defendants for a discharge at the close of the State's evidence.

2. In overruling the defendants' motion to be discharged at the close of all of the evidence.

3. In overruling the motion of the defendants for a new trial on each and every ground specified therein.

4. In not holding that Sec. 75-421 through Sec. 75-427, 1955 Supp., G. S. 1949, contravened the constitution of the United States and of the State of Kansas, and that said act was unconstitutional and void.

5. In permitting William H. Towers, special prosecutor, to testify as a witness for the State and in permitting him to continue to sit at the counsel table, approach the bench, and participate in arguments to the court on the admissibility of evidence, etc., after he had testified as a witness for the State.

6. In not holding that the argument of James P. Davis, assistant county attorney, wherein he referred to the fact that defendants, Arthur L. Sweeney and Peter L. Menser, did not testify in their own behalf was improper.

7. In holding that a public offense was committed by the defendants and in imposing a fine upon them.

8. In holding that the Masonic emblem consisting of the square and compass and letter "G" and the Masonic lambskin apron were registerable with the Secretary of State of the State of Kansas when the

same could not be the subject of a copyright or trademark under the Acts of Congress relating thereto.

9. In holding as a matter of law and instructing the Jury in Instruction No. 9 that the burden of proof was upon the defendants to show that they belonged to an organization which had peaceably used the Masonic emblem and apron in Kansas and other states in the United States for a period of more than 25 years prior to June 30, 1953, and that as members of such organization the defendants were entitled to wear and display such an emblem and apron for the reason that this ruling of the court and instruction No. 9 shifted the burden of proof in a criminal action from the State to the defendants.